Lembaga Kumpulan Simpanan Pekerja v HOL Chainstore (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21 NCVC-210–09 OF 2012
YEOH WEE SIAM J
13 FEBRUARY 2013

Civil Procedure — Summary judgment — Provident fund — Claim for arrears of contributions — Allegation that hard disc and documents of EPF stolen — Whether proven — Assessment done without obtaining supporting document — Allegations that employees lied about actual date of employment — Whether there was error in calculation — Whether summary judgment should be granted — Rules of Court 2012 O 14 r 1(1)

In the present application, the plaintiff sought for summary judgment under O 14 r 1(1) of the Rules of Court 2012 ('ROC') against the first and second defendants for, inter alia, arrears of contributions for the Employees Provident Fund ('EPF') in the sum of RM595,149 for the period of September 2000 to March 2010. The first and second defendants contended that the first defendant's hard disc and all its documents were stolen by its former employees. Therefore, it was further submitted that the plaintiff's assessment was done without obtaining supporting documents from the first defendant and there was a serious error in the calculation of the assessment since several employees had allegedly 'lied' about their actual date of employment. A settlement agreement signed by the second and third defendants stipulated that 30% of the amount owed to the plaintiff was to be paid by the first defendants' director ('the third defendant') and 70% of the said amount was to be paid by the second defendant. Counsel for the plaintiff then submitted that the third defendant would appeal to the plaintiff to accept 30% of the amount owed by him. If the third defendant was agreeable to it, the plaintiff would ask for consent judgment according to the claim for the total sum outstanding.

Held, allowing the application:

(1) The court recorded a consent judgment between the plaintiff and the third defendant. Costs of RM1,000 were to be paid by the third defendant to the plaintiff while costs of RM4,000 were to be paid by the first and second defendants jointly to the plaintiff. There was no defence to the plaintiff's claim. The third defendant did not dispute the plaintiff's claim and in fact voluntarily entered into the consent judgment for the claim with the plaintiff. This was a plain and obvious case for summary judgment to be granted to the plaintiff against the first and second defendants (see paras 5–6 & 8).

(2) Pursuant to s 46 of the Employees Provident Fund Act 1991 ('EPF Act'), in the event that any contributions remain unpaid, then any persons who were registered as directors of the company during the period of default, shall together with the company, be jointly and severally liable for all contributions, dividends and interest owing. The certificate of indebtedness read together with Form E (Form EPF 7) is 'binding' and 'conclusive' proof of the total debt outstanding until and unless the first defendant and/or the directors could prove a manifest error in the calculation of the EPF contributions owing as claimed by the plaintiff (see para 7(a)).

(3) The first defendant never contacted the plaintiff to dispute the assessment. In view of s 37A(2) of the EPF Act which provided that the assessment made by an inspector or officer of the EPF Board (in Form E) would be sufficient proof of the Board's claim for recovery of any contributions under s 65(1) of the same Act, the assessment made by the plaintiff ought to be accepted by the court (see para 7(b)).

(4) In the two police reports lodged by the second defendant, there was no mention that the properties stolen from the first defendant's premises were wages or employment records of the first defendant's employees. There was no subsequent police report to confirm that the documents stolen were in fact the wage or employment records of the first defendant's employees (see para 7(c)(i)–(ii)).

[Bahasa Malaysia summary

Dalam permohonan ini, plaintif memohon untuk penghakiman terus di bawah A 14 k 1(1) Kaedah-Kaedah Mahkamah 2012 ('KKM') terhadap defendan-defendan pertama dan kedua untuk, antara lain, tunggakan sumbangan bagi Kumpulan Wang Simpanan Pekerja ('EPF') dalam jumlah RM595,149 untuk tempoh September 2000 hingga Mac 2010. Defendan-defendan pertama dan kedua berhujah bahawa cakera keras defendan pertama dicuri oleh bekas pekerja-pekerja. Oleh itu, ia dihujahkan selanjutnya bahawa taksiran plaintif dilakukan tanpa mendapatkan dokumen-dokumen sokongan daripada defendan pertama dan terdapat kesilapan serius dalam pengiraan taksiran tersebut memandangkan beberapa perkerja telah kononnya 'lied' mengenai tarikh sebenar masuk kerja. Perjanjian penyelesaian ditandatangani oleh defendan-defendan kedua dan ketiga menetapkan bahawa 30% daripada jumlah tersebut perlu dibayar kepada plaintif dikehendaki dibayar oleh pengarah defendan pertama ('defendan ketiga') dan 70% daripada jumlah tersebut dikehendaki dibayar oleh defendan kedua. Peguam untuk plaintif kemudiannya berhujah bahawa defendan ketiga akan merayu kepada plaintif untuk menerima 30% daripada jumlah yang terhutang olehnya. Jika defendan ketiga bersetuju kepadanya, plaintif akan

memohon untuk penghakiman izin mengikut tuntutan untuk jumlah keseluruhan yang tertunggak.

Diputuskan, membenarkan permohonan:

(1) Mahkamah merekodkan penghakiman izin antara plaintif dan defendan ketiga. Kos RM1,000 perlu dibayar oleh defendan ketiga kepada plaintif sementara kos RM4,000 perlu dibayar bersama oleh defendan-defendan pertama dan kedua kepada plaintif. Tiada pembelaan kepada tuntutan plaintif. Defendan ketiga tidak mempertikaikan tuntutan plaintif dan sebenarnya secara sukarela memasuki perjanjian izin untuk tuntutan dengan plaintif. Ini adalah kes yang jelas dan ketara untuk penghakiman terus dibenarkan kepada plaintif terhadap defendan-defendan pertama dan kedua (lihat perenggan 5–6, 8).

(2) Berikutan s 46 Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta EPF'), jika apa-apa sumbangan kekal tidak dibayar, oleh itu mana-mana orang yang berdaftar sebagai pengarah-pengarah syarikat semasa tempoh pengikaran tersebut, akan bersama dengan syarikat, secara bersesama dan berasingan bertanggungjawab untuk kesemua sumbangan, dividen dan faedah yang perlu dibayar. Sijil keberhutangan dibaca bersama dengan Borang E (Borang EPF 7) adalah bukti 'binding' dan 'conclusive' jumlah keseluruhan hutang tertunggak sehingga dan kecuali defendan pertama dan/atau pengarah-pengarah boleh membuktikan kesilapan jelas dalam pengiraan sumbangan EPF yang perlu dibayar seperti yang dituntut oleh plaintif (lihat perenggan 7(a)).

(3) Defendan pertama tidak pernah berhubung dengan plaintif untuk mempertikaikan taksiran tersebut. Mengambil kira s 37A(2) Akta EPF yang memperuntukkan bahawa taksiran yang dibuat oleh inspektor atau pegawai Lembaga EPF (dalam Borang E) akan menjadi bukti yang mencukupi mengenai tuntutan Lembaga untuk mendapatkan semula apa-apa sumbangan di bawah s 65(1) Akta yang sama, taksiran yang dibuat oleh plaintif patut diterima oleh mahkamah (lihat perenggan 7(b)).

(4) Dalam laporan polis yang dibuat oleh defendan kedua, tidak dinyatakan bahawa barang-barang yang dicuri daripada premis defendan pertama adalah gaji atau rekod pekerjaan pekerja-pekerja defendan pertama. Tiada laporan polis berikutnya untuk mengesahkan bahawa dokumen-dokumen yang dicuri sebenarnya adalah gaji atau rekod pekerjaan pekerja-pekerja defendan pertama (lihat perenggan 7(c)(i)–(ii)).]

Legislation referred to

Employees Provident Fund Act 1991 ss 37A(2), 46, 64, 65(1)
Rules of Court 2012 O 14 r 1(1)

Preetam Kaur (Rithauddin & Azlin) for the plaintiff.
Bernard Gomes (Bernard Gomes & Co) for the first and second defendants.

Yeoh Wee Siam J:

JUDGMENT (IN RESPECT OF ENCL 8)

ENCLOSURE 8

[1] This is the application of the plaintiff under O 14 r 1(1) of the Rules of Court 2012 ('the ROC') for summary judgment against the first and second defendants for:

(a) arrears of contributions for the Employees Provident Fund ('EPF') totaling RM595,149 for the period September 2000–March 2010, together with:

(i) dividends on the amount at various specified rates from 31 December 2000–31 December 2011 and thereafter until full realisation; and

(ii) interest on the amount at various specified rates from 2 September 2000–19 February 2012 and thereafter until full realisation;

(b) costs; and

(c) other reliefs.

CONSENT JUDGMENT ENTERED INTO BETWEEN THE PLAINTIFF AND THE THIRD DEFENDANT

[2] On the hearing date of encl 8 on 16 January 2013, the third defendant, in person, and who was the director of the first defendant, informed the court that there was a settlement agreement signed between the second and third defendants on 23 December 2010 where 30% of the amount owed to the plaintiff was to be paid by the third defendant and 70% of the said amount is to be paid by the second defendant.

[3] Counsel for the plaintiff informed the court that on the basis of the above settlement agreement, the third defendant would be appealing to the plaintiff to accept 30% of the amount owed by him. If the third defendant agrees, then the plaintiff would ask for consent judgment according to the claim for the total amount outstanding. However, the third defendant can appeal after that to the EPF Board on quantum.

[4] The third defendant agreed to the suggestion of counsel for the plaintiff. A

[5] Accordingly, as requested by both parties, the court recorded a consent judgment between the plaintiff and the third defendant. Costs of RM1,000 are to be paid by the third defendant to the plaintiff forthwith. B

COURT'S DECISION REGARDING ENCL 8 BETWEEN THE PLAINTIFF AND THE FIRST AND SECOND DEFENDANTS

[6] The plaintiff's application is allowed. Costs of RM4,000 are to be paid by the first and second defendants jointly to the plaintiff forthwith. C

GROUNDS FOR THE COURT'S DECISION REGARDING ENCL 8

[7] The court fully agrees with the written submissions of counsel for the plaintiff. A few salient points need to be highlighted: D

(a) under s 64 of the EPF Act 1991 the certificate of indebtedness dated 11 November 2011 (exh NSI7 of the plaintiff's affidavit in support) shall be 'prima facie' evidence 'of the debt outstanding by the 1st Defendant Company ('the Company') and its Director's. E
Pursuant to s 46 of the EPF Act 1991, in the event that any contributions remain unpaid, then any persons who were registered as directors of the company during the period of default, shall together with the company, be jointly and severally liable for all contributions, dividends and interest owing. F
The certificate of indebtedness read together with Form E (Form EPF 7) is 'binding' and 'conclusive' proof of the total debt outstanding until and unless the first defendant and/or the directors can prove a manifest error in the calculation of the EPF contributions owing as claimed by the plaintiff. G
The plaintiff's assessment in Form E (Form EPF 7) was served on the first defendant on 2 November 2011 (exh NSI10 of the plaintiff's affidavit in support). The first defendant and/or its directors never contacted the plaintiff to dispute the assessment. H
Therefore, the assessment made by the plaintiff ought to be accepted by the court. This is in view of s 37A(2) of the EPF Act 1991 which provides that the assessment made by an inspector or officer of the EPF Board (in Form E) shall be sufficient proof of the board's claim for recovery of any contributions under s 65(1) of the same Act ie any civil claim; I

(b) the first and second defendants contended that the first defendant's hard disc and all its documents were stolen by its former employees. The plaintiff's assessment was therefore done without obtaining supporting documents from the first defendant and there is a serious error in the

calculation of the assessment since several employees had allegedly 'lied' about their actual date of employment;

(c) this contention by the first and second defendants cannot be accepted in view of the following:

(i) in the two police reports lodged by the second defendant (exh YTP1 in *affidavit jawapan defendan pertama dan defendan kedua*) there is no mention that the property stolen from the first defendant's premises were wage or employment records of the first defendant's employees;

(ii) there was no subsequent police report lodged by the second defendant to confirm that the documents that were stolen are in fact the wage or employment records of the first defendant's employees; and

(iii) there is no proof that Chan Kee Yin stole the hard disc of the first defendant. Neither did the first and second defendants adduce any evidence of Chan Kee Yin being charged for the alleged offence;

(d) on the issue whether Chan Kee Yin (Stanley Chan) and Yap Mei Ling (Sharyl Yap) were employed by the first defendant, the plaintiff has shown proof that these two persons were appointed as general manager and sales manager, respectively, of the first defendant (see paras 17–19 of *afidavit balasan plaintif*, exh YTP3 of *afidavit jawapan defendan* and exh NH5 of *afidavit balasan plaintif*); and

(e) on the issue of the actual date of employment of the three employees ie Chan Lee Fatt, Law Kwai Ngo and Lau Guek Cheng, and whether Chan Kee Yin gave false evidence to the plaintiff, the plaintiff has shown proof that the three employees were in fact employed during the time the EPF assessment was due and owing to them. The EA Tax Assessment forms were clearly signed and executed by the first defendant and this proves the actual dates of employment of the three employees (see also para 13 of *afidavit balasan plaintif*).

[8] The court is satisfied that there is no defence to the plaintiff's claim. It must also be noted that the third defendant, a director of the first defendant, did not dispute the plaintiff's claim. The third defendant voluntarily entered into the consent judgment for the claim with the plaintiff. This is a plain and obvious case for summary judgment to be granted to the plaintiff against the first and second defendants.

[9] Based on the foregoing grounds, I therefore ordered accordingly. **A**

Application allowed.

Reported by Afiq Mohamad Noor **B**

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